FILED
001375 FEB 26 2001
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

THE CONSUL GENERAL FOR THE REPUBLIC OF POLAND IN CHICAGO and GREGORY A. MADEJ,

Petitioners,

v.

ILLINOIS, JAMES M. SCHOMIG, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

DOUGLASS W. CASSEL
CENTER FOR INTERNATIONAL HUMAN RIGHTS
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-2224

Attorney for Petitioner Consul General for the Republic of Poland in Chicago

CHARLES F. SMITH
Counsel of Record
CHRISTINA M. TCHEN
AMARJEET S. BHACHU
333 West Wacker Drive, Suite 2100
Chicago, Illinois 60606
(312) 407-0700

STEPHEN E. EBERHARDT
16860 South Oak Park Avenue
Suite 102
Tinley Park, Illinois 60477
(708) 444-2390

Attorneys for Petitioner Gregory A. Madej

165251

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

91 pp

CAPITAL CASE

QUESTIONS PRESENTED

The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. (the "Vienna Convention") does not expressly provide a remedy for breach of its provisions; instead, it provides that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." The questions presented are:

1. When a sovereign nation and its national both seek relief from convictions and a death sentence obtained after an admitted violation of the consular notification provisions of the Vienna Convention:

A. Does the decision of a bare majority of the Illinois Supreme Court to rely upon Illinois law to determine the appropriate remedy violate the Supremacy Clause?

B. Does customary international law require annulment of the convictions and death sentence obtained in violation of the Vienna Convention?

C. Are the convictions and death sentence subject to automatic reversal, or are they subject to harmless error review under the standards enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Arizona v. Fulminante*, 499 U.S. 279 (1991)?

2. Whether time-barring a sovereign nation and its national from seeking relief from a judgment entered in violation of the Vienna Convention, under a limitations period that expired fourteen years before the nation received notice of that judgment, violates the Due Process Clause, Article 36(2) of the Vienna Convention or applicable international law.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Treaty Involved	1
Statement of the Case	5
I. Background	5
A. Gregory Madej's Arrest	5
B. Gregory Madej's Trial Counsel, With No Prior Experience in Death Penalty Cases, Commits Numerous Errors	6
II. Proceedings In This Case	8
A. The Federal Issues Were Raised Below	8
B. The Illinois Supreme Court's Ruling	9

Contents

Page

1. The Ruling Concerning the Appropriate Remedy Under International Law 10

2. Rulings on Other Issues 11

Reasons for Granting the Writ 13

I. The Writ Should Be Granted To Determine Whether The State And Federal Courts May Continue To Fashion Their Own Remedies For Violations Of The Vienna Convention, In Clear Derogation Of The Remedy Mandated By The Text Of The Treaty, The International Law Of Remedies, And The Supremacy Clause 14

II. The Writ Should Be Granted So That This Court Can Establish The Standard Of Review For Violations Of The Vienna Convention, If Domestic Law Is Applicable 20

A. Prejudice Should Be Presumed When the Vienna Convention is Violated ... 20

B. The Violation of the Vienna Convention Was Not Harmless Beyond a Reasonable Doubt 21

Contents

	Page
III. The Writ Should Be Granted Because, Unlike In *Breard* And *Federal Republic Of Germany*, There Is No Bar To Consideration Of The Merits	24
A. The Procedural Issues That Confronted This Court in *Breard* and *Federal Republic of Germany* Are Not Present Here	24
B. There Is No Adequate and Independent State Ground Barring Review	26
C. Time-Barring the Petitioners' Claims Violates Due Process and International Law	27
Conclusion	28

TABLE OF CITED AUTHORITIES

Page

Cases:

Advisory Opinion OC-16/99, Oct. 1, 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* 18, 19

Ake v. Oklahoma, 470 U.S. 68 (1985) 27

Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) ... 15

Arizona v. California, 292 U.S. 341 (1934) 15

Arizona v. Fulminante, 499 U.S. 279 (1991) 21

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 20

Breard v. Greene, 523 U.S. 371 (1998) ..... *passim*

Chorzów Factory (F.R.G. v. Pol.), 1928 P.C.I.J. (ser. A) No. 13 (Sept. 13) 18

Doe v. Braden, 57 U.S. 635 (1854) 16

Enterprise Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157 (1917) 26

Federal Republic of Germany v. United States, 526 U.S. 111 (1999) 13, 24

Cited Authorities

	Page
Ford v. Georgia, 498 U.S. 411 (1991)	27
Hildwin v. Florida, 490 U.S. 638 (1989)	27
Lerner v. Zipperman, 387 N.E.2d 946 (Ill. App. Ct. 1979)	27
Ligon v. Williams, 637 N.E.2d 633 (Ill. App. Ct. 1994)	27
McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)	25
Michigan v. Long, 463 U.S. 1032 (1983)	26
People v. Madej, 685 N.E.2d 908 (Ill. 1997)	7, 22
R.W. Sawant & Co. v. Allied Programs Corp., 489 N.E.2d 1360 (Ill. 1986)	10
Strickland v. Washington, 466 U.S. 668 (1984)	21
Sullivan v. Louisiana, 508 U.S. 275 (1993)	22
Teague v. Lane, 489 U.S. 288 (1989)	25
Texas Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic, (Dupuy, arb., Award of January 19, 1977), *reprinted in* 17 I.L.M. 1 (1978)	17, 18

Cited Authorities

Page

United States v. Li, 206 F.3d 56 (1st Cir.), *cert. denied*, 121 S. Ct. 378 (2000) 17

United States v. Lombera-Camorlinga, 206 F.3d 882 (9th Cir.), *cert. denied*, 121 S. Ct. 481 (2000) 17, 20

Whitney v. Robertson, 124 U.S. 190 (1888) 25

United States Constitution:

Article VI 1, 2, 16

Fourteenth Amendment 2

Statute:

28 U.S.C. § 1257 ..... 1, 24

Rule:

Sup. Ct. R. 10(c) 14

Cited Authorities

Page

Other Authorities:

H. Lauterpacht, *The Function of Law in the International Community* (1933) 18

Report of the International Law Commission on the Work of its Fifty-Second Session, UNGAOR Supp. No. 10, U.N. Doc. A/55/10 (2000) 19

Report of the International Law Commission on the Work of Its Forty-Fifth Session, [1993] 2 Y.B. Int'l L. Comm'n, pt. 2, U.N. Doc A/48/10 19

United Nations Conference on Consular Relations: Official Records Volume I: Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees, U.N. Doc. A/CONF.25/16 (1963) 15, 17

The Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. ..... *passim*

Webster's Third New International Dictionary (1981) 16

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of Illinois Dated And Filed August 10, 2000 ..... 1a

Appendix B — Memorandum Opinion And Order Of The Circuit Court Of Cook County, Illinois, County Department, Criminal Division Dated And Filed May 3, 1999 ..... 21a

Appendix C — Letter Of The Supreme Court Of Illinois Denying Petition For Rehearing Dated November 27, 2000 ..... 48a

Appendix D — Letter Of The Supreme Court Of Illinois Staying Mandate Dated December 19, 2000 ..... 49a

The Consul General for the Republic of Poland in Chicago (the "Consul General") and Gregory Madej (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the Illinois Supreme Court's decision denying their petitions seeking relief from the State of Illinois' admitted violation of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention").

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 739 N.E.2d 423 and is reprinted in the Appendix. (App. 1a-20a)[1] The opinion of the Circuit Court of Cook County is not reported and is reprinted in the Appendix. (App. 21a-47a)

STATEMENT OF JURISDICTION

On August 10, 2000, the Illinois Supreme Court entered its judgment affirming the trial court's denial of the Consul General's and Gregory Madej's petitions for relief. An order denying rehearing was issued on November 27, 2000 and is reprinted in the Appendix. (App. 48a) This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND TREATY INVOLVED

This case involves Article Six of the United States Constitution, as well as the Fourteenth Amendment to the United States Constitution.

---

1. References to the Appendix attached hereto appear as (App. __a). References to the common law record appear as (C. __). References to the reports of proceedings appear as (R. __ (Month, Day, Year)). References to the joint brief filed by Petitioners before the Illinois Supreme Court appear as (Joint Brief at __). References to the State of Illinois' brief before that court appear as (State's Brief at __). References to the Petitioners' reply brief before that court appear as (Reply Brief at __).

Article VI to the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The preamble to the Vienna Convention provides:

The States Parties to the present Convention,

Recalling that consular relations have been established between peoples since ancient times,

Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

Considering that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,

Believing that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,

Affirming that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

Have agreed as follows:

Article 36 of the Vienna Convention provides:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State

shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

STATEMENT OF THE CASE

I. BACKGROUND

A. Gregory Madej's Arrest

Gregory Madej is a Polish citizen. (C. 13, 458) He was born on August 25, 1959, in Kielce, Poland. (C. 13, 458) He is fluent in Polish, and has made several trips back to Poland to visit his family. (C. 13-14, 458) As a Polish citizen, he was entitled to the protections of the Vienna Convention. (C. 14-15, 458-59)

Pursuant to Article 36 of the Vienna Convention, the United States (and, pursuant to the Supremacy Clause of the United States Constitution, the State of Illinois) is required to inform a Polish national who has been arrested and detained that he has the right to contact a consular official from his country. (C. 14, 458) Moreover, under the Vienna Convention, the United States is required, upon the detained national's request, to notify the consular post of Poland if a national of Poland is "arrested or committed to prison or to custody pending trial or is detained in any other manner." (C. 14, 458)

Gregory Madej was arrested on August 23, 1981, and was subsequently charged with murder, felony-murder, armed robbery, rape and deviate sexual assault. (C. 14, 458) Immediately after his arrest, the police interrogated him. (C. 14, 458) Even after he indicated that he did not wish to speak to the police, police officers and an Assistant State's Attorney continued to question him. (C. 14, 458) He was denied food, sleep, medical attention, a telephone call, and the right to communicate with an attorney or his family. (C. 14, 458)

The State of Illinois admits that it failed to advise Gregory Madej of his rights under the Vienna Convention. (C. 15, 39, 273, 459, 480) He therefore was unaware that, pursuant to the Vienna Convention, he had the right to consult, and seek the assistance of, the Consulate of the Republic of Poland in Chicago (the "Polish Consulate"). (C. 15, 39, 459, 480)

The Polish Consulate was unaware that Gregory Madej had been arrested and detained in violation of the Vienna Convention pending trial, and therefore was unable to render any timely assistance. (C. 15, 42, 459, 483) As a result, Gregory Madej was forced to rely upon the efforts of his inexperienced trial counsel. As discussed below, the results were disastrous.

B. Gregory Madej's Trial Counsel, With No Prior Experience in Death Penalty Cases, Commits Numerous Errors

In anticipation of trial, an attorney was hired to represent Gregory Madej. (C. 15-16, 460) Unfortunately, his attorney had little if any experience trying criminal cases, and he had no experience whatsoever in a case that involved the death penalty. (C. 16, 460) Defense counsel made a number of critical errors that led to conviction and imposition of the death sentence. Some of the errors are as follows:

(a) Defense counsel failed to conduct pre-trial investigation to defend Gregory Madej suitably at trial. For example, defense counsel failed to develop the theory that a second suspect may have been implicated in the crime, even though there was evidence, including a 911 tape and unidentified latent fingerprints, that strongly suggests another person may have been involved in the murder of the decedent. (C. 16, 460) Development of this theory was also critical for the sentencing phase of the proceedings because it would have pointed to Gregory Madej's limited culpability.

(b) Defense counsel made Gregory Madej testify at trial; as the State admits, defense counsel did not inform him that it was his decision whether or not to testify. (C. 16, 59, 275, 460, 500) The State characterized his testimony as a confession to murder, and the trial court expressly relied upon his testimony in convicting him and, as the State admits, in sentencing him to death. (C. 16, 275, 460)

(c) Defense counsel stipulated to death eligibility (C. 16, 461), even though Gregory Madej has consistently denied committing the underlying felonies that made him death-eligible.

(d) Before the sentencing phase, defense counsel failed to inform Gregory Madej that the jury would have to be unanimous in order to sentence him to death. (C. 17, 59, 63, 461, 500, 504) Accordingly, he opted for bench sentencing.

(e) Defense counsel performed absolutely no mitigation investigation and presented no mitigating evidence on Gregory Madej's behalf during the sentencing proceedings. (C. 17, 59-60, 461, 500-01) Thus, as the Illinois Supreme Court has decided, defense counsel's performance was objectively unreasonable during the sentencing phase. *People v. Madej*, 685 N.E.2d 908, 919 (Ill. 1997) ("counsel's failure in this case to conduct an investigation into potential sources of mitigation fell below the minimum level of competent representation").[2]

However, as noted above, the Polish Consulate was unaware that Gregory Madej had been arrested and detained pending trial, and was unable to render any assistance. Gregory Madej proceeded to trial in August 1982, was convicted, and sentenced to death. (C. 15, 460)

The Illinois Supreme Court affirmed Gregory Madej's convictions and sentence of death on direct appeal. *People v. Madej*, 478 N.E.2d 392 (Ill. 1985). Thereafter, he unsuccessfully sought post-conviction relief. *People v. Madej*, 685 N.E.2d at 932. The Consul General, the diplomatic representative of the

---

2. It turns out that inexperience and bad judgment were not the only shortcomings of trial counsel. On December 27, 2000, Gregory Madej filed pleadings with the Circuit Court of Cook County seeking relief from his death sentence on the newly-discovered ground that his trial counsel simultaneously was employed as a full-time prosecutor for the Office of the Secretary of State at the time of his capital murder trial.

Republic of Poland in Chicago, discovered Gregory Madej had been convicted and sentenced to death almost sixteen years after his trial — in May 1998. (C. 18, 42, 463, 483)

II. PROCEEDINGS IN THIS CASE

After the denial of post-conviction relief, Gregory Madej filed two actions in the Circuit Court of Cook County on July 31, 1998, seeking relief from the violations of the Vienna Convention: one based on a Petition for Relief Pursuant to 735 ILCS 5/2-1401, and in the Alternative, Petition for Relief from Void Orders (the "2-1401 Petition"), and the other based on a Petition for Writ of *Mandamus* (the "*Mandamus* Petition").[3]

On December 15, 1998, the Consul General moved to intervene in both actions and filed his own pleadings seeking relief in both cases. (C. 300, 859) The Consul General's motion for intervention was granted by one circuit court judge in the *Mandamus* Proceeding, but denied by another judge in the 2-1401 Proceeding. (R. 4 (Jan. 19, 1999); R. 7 (Feb. 26, 1999)) Both actions were subsequently consolidated before one judge.

A. The Federal Issues Were Raised Below

Each of the issues raised in this petition was raised in the courts below. First, the Petitioners argued in both the Circuit Court and before the Illinois Supreme Court that, because of the violation of the Vienna Convention in this case, the international law of remedies, namely, the remedy of *restitutio in integrum*, rendered Gregory Madej's convictions and death sentence void. The Petitioners also argued that the Supremacy Clause obligated state courts to apply the international law of remedies and *restitutio in integrum*. (C. 22, 27, 29-33; Joint Brief at 2, 14, 20-34) In the alternative and at a minimum, the Consul General requested that the death sentence be set aside and the case remanded for a new hearing on sentencing. (C. 384; Joint Brief at 28-29) This request was based on the heightened procedural guarantees required under international

---

3. Two separate petitions were filed in accordance with local rules.

law for imposition of the death penalty, as well as the Republic of Poland's particular concern for "strict compliance" with the Vienna Convention in instances where its nationals might be exposed to a death sentence. (*Id.*)

Second, the Petitioners also argued in the alternative that, should the courts refuse to apply international law, prejudice should be presumed for the reasons stated by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and *Arizona v. Fulminante*, 499 U.S. 279 (1991). Moreover, the Petitioners argued that the violation of the Vienna Convention was not harmless beyond a reasonable doubt, and that they satisfied the prejudice standard actually employed by the circuit court through the uncontradicted evidence submitted in support of their petitions for relief. (C. 22-24, 351-55; Joint Brief at 36-50)

Third, the Petitioners also argued that they satisfied various procedural requirements for relief under Illinois law. The Petitioners argued that the 2-1401 Petition and the *Mandamus* Petition were not time-barred because, *inter alia*: (i) Gregory Madej's convictions and death sentence were void under international law, and therefore could be collaterally attacked at any time; (ii) the Consul General only recently discovered the violation of the Vienna Convention, and thus the doctrines of equitable tolling and due process of law rendered his petitions timely; (iii) international law and Article 36(2) of the Vienna Convention did not permit state procedural law to be asserted as a defense to the violation of the Vienna Convention; and (iv) there was no statute of limitations applicable to *mandamus* actions under Illinois law, and they were entitled to issuance of the writ. (C. 22, 27, 465-66, 471, 841; Joint Brief at 22, 60-71)

B. The Illinois Supreme Court's Ruling

On May 3, 1999, the Circuit Court denied the 2-1401 Petition and the *Mandamus* Petition. (App. 47a) Thereafter, Gregory Madej and the Consul General perfected appeals to the Illinois Supreme Court.

On August 10, 2000, the Illinois Supreme Court, by four votes to three, affirmed the Circuit Court's denial of the 2-1401 Petition and the *Mandamus* Petition. As discussed below, the members of the Illinois Supreme Court expressed substantial differences of opinion over the merits of the case.

1. The Ruling Concerning the Appropriate Remedy Under International Law

The majority opinion first addressed the key contention made in the 2-1401 Petition and the *Mandamus* Petition: that under international law, the remedy of *restitutio in integrum* rendered Gregory Madej's convictions and death sentence void. A bare majority of the court concluded that the convictions and death sentence were not void because the orders entered in the case were not void under state decisional law. (App. 7a (citing *R.W. Sawant & Co. v. Allied Programs Corp.*, 489 N.E.2d 1360 (Ill. 1986))) In light of the considerable authority cited by the Petitioners, the majority opinion briefly acknowledged the primacy of the remedy of *restitutio in integrum* under international law. (*Id.*) The majority opinion opted not to apply international law, however; the majority instead suggested that *restitutio in integrum* would require the court to annul something, not render Gregory Madej's convictions and death sentence void. (*Id.*) The majority opinion did not offer any explanation of the difference between the terms "annul" and "void" in international law or any other body of law.

The three dissenters took issue with the majority's analysis. Justice McMorrow, concurring in part and dissenting in part, concluded, *inter alia*, that the violation of the Vienna Convention required a remedy under international law, at least as to Gregory Madej's death sentence. After pointing out that the Supremacy Clause made the Vienna Convention binding upon the States, App. 14a, Justice McMorrow cited the October 1999 advisory opinion of the Inter-American Court of Human Rights, which held that a violation of an international treaty gives rise to "the juridical consequences that a violation of this nature carries, in

other words, those pertaining to *the State's international responsibility and the duty to make reparation*." (App. 15a (citation omitted) (Justice McMorrow's emphasis)).

Justice McMorrow also pointed out that the violation of the Vienna Convention affected the rights not only of Gregory Madej, but of the Republic of Poland, which had a justifiable interest in aiding its national. Moreover, Justice McMorrow pointed out that the Federal Republic of Germany and the United Mexican States, two other signatories to the Vienna Convention, supported the position adopted by the Republic of Poland, and, further, that "El Salvador, Guatemala, the Dominican Republic, Honduras, Paraguay and Costa Rica supported the principle of judicial enforcement of the Vienna Convention in death penalty cases." (App. 16a)

Justice Heiple's dissent, joined by Chief Justice Harrison, expressed similar concerns with the majority's reasoning. Justice Heiple chided the majority for "cavalierly dismiss[ing]" the violation of the Vienna Convention. (App. 20a) Justice Heiple also adhered to the argument raised by the Petitioners: the violation of the Vienna Convention — taken together with the Supremacy Clause — required reversal of the convictions and death sentence. (*Id.*)

2. Rulings on Other Issues

With its decision not to apply *restitutio in integrum*, the majority opinion rejected the claim that the convictions and death sentence were void under international law. Consequently, the majority decided that relief could not be granted to the extent the 2-1401 Petition and the *Mandamus* Petition sought relief from void orders.

Thereafter, the majority considered whether the 2-1401 Petition was otherwise timely filed. The majority ruled that the Consul General's 2-1401 Petition was not timely despite the fact that the Consul General had discovered the violation of the

Vienna Convention only in May 1998. (App. 7a-8a)[4] The majority opinion concluded that the statute of limitations had not been complied with. However, the majority opinion did not address the application of the doctrine of equitable tolling, nor did it address the due process arguments raised with respect to the impropriety of defaulting a sovereign nation that had not received notice of a judgment secured in violation of its treaty rights.[5]

The majority opinion also decided that the Petitioners were not entitled to the relief sought by the *Mandamus* Petition. In this instance, there was *no* statute of limitations problem confronting the *Mandamus* Petition. First, the majority opinion reiterated that the convictions and death sentence were not void. (*Id.* 11a) Thereafter, the majority opinion announced that it would not issue *mandamus* relief because Petitioners had not shown a "clear, affirmative right to relief." (*Id.*) However, the majority opinion did not explain why this standard had not been met.

The dissenters also expressed their doubt over the wisdom of these rulings, particularly the conclusion that the Consul General was time-barred from seeking relief. In the words of Justice McMorrow, "[t]hrough no fault of its own, the Polish government is only now able to assist its citizen in his death penalty defense." (*Id.* 17a) Justice Heiple sounded a similar

---

4. The Consul General appealed the denial of his motion for intervention in the proceeding relative to the 2-1401 Petition. The Illinois Supreme Court assumed the Consul General's intervention was permissible for purposes of its opinion. (App. 7a-8a)

5. The majority opinion also rejected the argument that international law and Article 36(2) of the Vienna Convention precluded reliance on a state procedural bar, relying in large measure on this Court's *per curiam* opinion issued with respect to the denial of *certiorari* in *Breard v. Greene*, 523 U.S. 371 (1998).

theme, noting that "[i]n the instant case . . . the Polish Consul General was not even aware of defendant's situation until 1998, some 16 years after his conviction and sentence." (*Id.* 20a)

Thereafter, on November 27, 2000, the Illinois Supreme Court denied a timely-filed petition for rehearing. (*Id.* 48a)

REASONS FOR GRANTING THE WRIT

This petition, filed on behalf of both a sovereign nation and its aggrieved national, presents a critical federal question that deserves this Court's attention — whether or not the state and federal courts may continue to fashion their own remedies for violations of the Vienna Convention, in clear derogation of the text of the treaty and the Supremacy Clause, which collectively require the application of international law to formulate the appropriate remedy for the breach of this treaty.

Unlike previous petitions addressed to this Court by other sovereign nations seeking relief from Vienna Convention violations in death penalty cases — such as in *Breard v. Greene*, 523 U.S. 371 (1998) and *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) — this case focuses on the application of the international law of remedies. The Republic of Poland, with the support of two other sovereign nations in proceedings before the Illinois Supreme Court and the recent advisory opinion of the Inter-American Court of Human Rights, maintains that the international legal remedy of *restitutio in integrum*, made applicable by the text of the Vienna Convention, requires the annulment of a death sentence entered in violation of the Vienna Convention.

This case also presents an opportunity not afforded the Court in *Breard* and *Federal Republic of Germany*: an opportunity to resolve and fully address the important issue of the appropriate remedy for a violation of the Vienna Convention — without the time pressure of an imminent execution — based on a comprehensive record that has been thoroughly briefed and argued. Indeed, if it is necessary for this Court to consider

the application of domestic law to this case in formulating a remedy, there is ample evidence in the record of the prejudice suffered by Gregory Madej at the hands of defense counsel, whose parade of errors led the Illinois Supreme Court to unanimously conclude that Gregory Madej did not receive the "minimum level of competent representation" during capital sentencing proceedings.

This case is also different from *Breard* and *Federal Republic of Germany* in another important respect. In those cases, this Court took the highly unusual step of issuing *per curiam* opinions explaining the principles that led to the denial of *certiorari*. The procedural issues that prevented the Court from granting *certiorari* in those cases simply are not present here. Accordingly, for these and the other reasons discussed below, the Court should grant this petition.

I. THE WRIT SHOULD BE GRANTED TO DETERMINE WHETHER THE STATE AND FEDERAL COURTS MAY CONTINUE TO FASHION THEIR OWN REMEDIES FOR VIOLATIONS OF THE VIENNA CONVENTION, IN CLEAR DEROGATION OF THE REMEDY MANDATED BY THE TEXT OF THE TREATY, THE INTERNATIONAL LAW OF REMEDIES, AND THE SUPREMACY CLAUSE

This Court's review of the Illinois Supreme Court's decision is warranted because it "decided an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), and also "decided an important federal question in a way that conflicts with the relevant decisions of this Court." *Id.*

The Illinois Supreme Court and, for that matter, the federal courts of appeal that have taken up the issue of the appropriate remedy for a violation of the Vienna Convention, have been proceeding "on the erroneous and all-too-common assumption" that the Vienna Convention "means what we think it ought to

mean." *Cf. Apprendi v. New Jersey*, 120 S. Ct. 2348, 2367 (2000) (Scalia, J., concurring). Indeed, "[i]t does not; it means what it says." *Id.*

What this international treaty entered into by over 160 nations, this "Supreme Law of the Land," says, is: "[T]he rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." Vienna Convention, preamble cl. 7. *See also United Nations Conference on Consular Relations: Official Records Volume I: Summary Records of Plenary Meetings and of the Meetings of the First and Second Committees*, at 246 ¶ 7, U.N. Doc. A/CONF.25/16 (1963) [hereinafter "*Official Records I*"] (customary international law governs matters not expressly regulated by provisions of Vienna Convention (Switzerland)). Indeed, even during the debates over Article 36 itself,[6] delegates from several countries pointed out that any issues not expressly addressed in Article 36 would be resolved by reference to customary international law. *Official Records I*, at 43 ¶¶ 55, 2, 5. The Vienna Convention does not expressly provide a remedy for its breach, and therefore reference must be made to international law.

Indeed, the State conceded in its brief before the Illinois Supreme Court that the Vienna Convention itself provides that "the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention." (State's Brief at 46) The State further has "assumed" that "customary international law is incorporated into the U.S. legal system pursuant to the Supremacy Clause." (*Id.*)

---

6. *Arizona v. California*, 292 U.S. 341, 359-60 (1934) ("It has often been said that when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning.") (citations omitted).

One would be hard-pressed to develop a set of circumstances in which the Supremacy Clause would *not* be applicable to the terms of this or any other treaty. Indeed, this Court has instructed that "the courts of justice have no right to annul or disregard any of [a treaty's] provisions, unless they violate the Constitution of the United States." *Doe v. Braden*, 57 U.S. 635, 657 (1854).

Despite the rather clear textual instruction in this treaty and its drafting history requiring reference to the international law of remedies, a bare majority of the Illinois Supreme Court opted to apply its *own* state law to determine the consequences for the violation of the Vienna Convention. (App. 7a)[7] This result, although perhaps permissible under the Articles of Confederation, clearly violates the text of the Vienna Convention, the international law of remedies (as discussed further herein), and the Supremacy Clause. U.S. Const. art. VI, cl. 2. The three dissenters recognized as much: Justice McMorrow emphasized the obligation of the State of Illinois to make reparation for its violation under international law, and Justice Heiple, joined by the Chief Justice, decided that the Supremacy Clause mandated a new trial and sentencing proceeding. (App. 15a, 20a)

Unfortunately, the Illinois Supreme Court's decision is not an anomaly. A number of federal courts of appeals throughout the nation have formulated their own "theories" about the appropriate remedies for violations of the Vienna Convention — *not a single one of them* based on the *text* of the Vienna Convention or the body of law it makes applicable, the

---

7. The Illinois Supreme Court also suggested that annulment of an order does not render it void. (App. 7a) Not so. The term "annul" means "to cause to cease to exist: reduce to nothing: blot out: OBLITERATE . . . make inoperative . . . NEUTRALIZE, CANCEL . . . *to make legally void*: declare to be no longer of legal effect." Webster's Third New International Dictionary 88 (1981) (italics added). Indeed, were there any doubt at all left at this point, the term "void" is itself defined as "NULLIFY, ANNUL." *Id.* at 2562.

international law of remedies. Instead, the federal courts of appeals, including the First and Ninth Circuits, have announced that the Vienna Convention is "silent" as to remedies and that, as a matter of policy, an "exclusionary" remedy is typically available only for constitutional or so-called "fundamental" violations. *United States v. Li*, 206 F.3d 56, 61 (1st Cir.) (*en banc*), *cert. denied*, 121 S. Ct. 378 (2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 886-87 (9th Cir.) (*en banc*), *cert. denied*, 121 S. Ct. 481 (2000).

Although these opinions often claim that the drafters of the Vienna Convention did not have the exclusion of evidence in mind as a remedy when the Vienna Convention was drafted,[8] apparently these courts also have decided that what the drafters really *did* have in mind was the jurisprudence of the federal courts of the United States of America, along with its (purported) distinctions between violations of certain (undefined) "fundamental" rights and violations of international treaty obligations. Of course, this is not the case. What the drafters of the Vienna Convention had in mind, and what they enshrined in the Vienna Convention, was the primacy of customary international law to resolve issues not "expressly regulated" by the provisions of the treaty. Vienna Convention preamble, cl. 7; *Official Records I*, at 43 ¶¶ 55, 2, 5; 246 ¶ 7.

Looking to international law, it is clear what the appropriate remedy for a violation of the Vienna Convention is: *restitutio in integrum*. The principle of *restitutio in integrum* is well established in international law. The International Court of Justice and other learned commentators have repeatedly recognized that, as the fundamental remedy for a violation of international law, *restitutio in integrum* requires "annulment of the judgment of a national tribunal delivered in contradiction with international law." *Texas Overseas Petroleum Co./*

---

8. *See, e.g.*, *Lombera-Camorlinga*, 206 F.3d at 886 ("no reason to think the drafters of the Vienna Convention had these uniquely American rights in mind").

California Asiatic Oil Co. v. Government of the Libyan Arab Republic, (Dupuy, arb., Award of January 19, 1977), *reprinted in* 17 I.L.M. 1, 31-37 (1978) (citations and internal quotation marks omitted).

Even before the establishment of the International Court of Justice, the Permanent Court of International Justice in 1928 recognized that acts in contravention of international law are void. In the celebrated *Chorzów Factory* case, the Permanent Court of International Justice decided that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Chorzów Factory (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13). The principle of reparation expressed in *Chorzów Factory* was itself premised upon a long series of prior international arbitral decisions. *See* H. Lauterpacht, *The Function of Law in the International Community* 117 (1933).

The considerable legal authority supporting the use of *restitutio in integrum* has culminated with the issuance of an advisory opinion by the Inter-American Court of Human Rights, cited by Justice McMorrow in her opinion.[9] Rejecting the arguments of the United States Department of State that no judicial remedy existed to address a violation of the Vienna Convention, the Inter-American Court of Human Rights held that a violation of the Vienna Convention comes "with the juridical consequences that a violation of this nature carries, in other words, those pertaining to the State's international responsibility and the duty to make

---

9. This advisory opinion was not addressed by the First and Ninth Circuits in *Li* and *Lombera-Camorlinga*. Significantly, both decisions failed to address the application of the international law of remedies. These cases are also inapposite here, because in neither case were sovereign nations party to the proceedings (as in *Breard* and *Federal Republic of Germany*), nor did the violations of the Vienna Convention in those cases result in a death sentence — a penalty requiring the strictest observance of procedural safeguards under international law.

reparation." Advisory Opinion OC-16/99, Oct. 1, 1999, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* ¶¶ 27, 137, 141.7.[10] In the death penalty context, the United States is the *only* party to the Vienna Convention that has taken the position that such violation of the Vienna Convention is not judicially remediable. All other nations that have taken a position disagree.[11]

As the matter currently stands, the decision of the Illinois Supreme Court — and those of several of the federal courts of appeals — conflict with not only the text of the treaty, international law, and the Supremacy Clause, but also with the

---

10. Recent and authoritative evidence of the international responsibility of states and the duty to make reparation is found in the Draft Articles of State Responsibility, provisionally adopted by the Drafting Committee of the International Law Commission of the United Nations in 2000, with a view toward codifying pre-existing customary international law. Draft Articles on State Responsibility, article 36, Report of the International Law Commission on the Work of its Fifty-Second Session, UNGAOR Supp. No. 10 at 133, U.N. Doc. A/55/10 (2000). Restitution "is the form of reparation which most closely conforms to the general principle of the law of responsibility according to which the author State is bound to 'wipe out' all the legal and material consequences of its wrongful act . . . ." Report of the International Law Commission on the Work of Its Forty-Fifth Session, [1993] 2 Y.B. Int'l L. Comm'n, pt. 2, at 62, U.N. Doc A/48/10. Under international law the Republic of Poland is therefore entitled to restitution, which in this case requires "juridical restitution," *i.e.*, "rescinding of [a] . . . judicial measure unlawfully adopted in respect of the person . . . of a foreigner . . . ." *Id.* at 64.

11. Indeed, as noted above, the Consul General specifically asked the Illinois Supreme Court to, at a minimum, reverse the death sentence in this case so that he could assist his national during the course of a new sentencing proceeding. This request was based on the greater need for "strict compliance" with the protections of the Vienna Convention in the death penalty context, as well as the Republic of Poland's concern for the imposition of the death penalty on its national. The Consul General is prepared to raise the same arguments in this forum.

decision of the Inter-American Court of Human Rights, which has clearly identified the international law of reparations as the proper source for determining the remedy for violations of the Vienna Convention. In addition, the Illinois Supreme Court and the federal courts of appeal are in conflict with the interpretation of the treaty given by at least nine nations that are party to the Vienna Convention. (App. 16a) Far from lending "harmony" to the interpretation of the treaty as some federal courts of appeals erroneously suggest,[12] these decisions have served to undermine confidence in the United States of America's commitment to abide by its treaty obligations. Because the issues raised in this petition "bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964), this Court should grant the writ.

II. THE WRIT SHOULD BE GRANTED SO THAT THIS COURT CAN ESTABLISH THE STANDARD OF REVIEW FOR VIOLATIONS OF THE VIENNA CONVENTION, IF DOMESTIC LAW IS APPLICABLE

Under the principle of *restitutio in integrum*, a violation of the Vienna Convention requires no showing of prejudice. However, because the issues concerning prejudice have been fully argued and briefed by the parties below, and the record contains ample evidence of prejudice, this case presents an appropriate vehicle to decide the proper standard applicable to violations of the Vienna Convention under domestic law should the Court determine that the international law of remedies is not applicable.

A. Prejudice Should Be Presumed When the Vienna Convention is Violated

Although this Court has suggested that a harmless error standard is appropriate for violations of the Vienna Convention, *Breard*, 523 U.S. at 376, there are compelling reasons to treat

12. *See, e.g., Lombera-Camorlinga*, 206 F.3d at 888.

the violation of the Vienna Convention as structural error. *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). The State's failure to abide by the Vienna Convention amounted to a structural error because the failure to accord Gregory Madej his rights under the Vienna Convention affected the record as a whole. For example, because Gregory Madej was not represented by competent counsel arranged for by the Polish Consulate: (1) he was represented by inexperienced counsel, whose incompetence tainted the entire proceedings; (2) he was not advised of his right to choose whether to testify by defense counsel — an error that resulted in over 30 percent of the trial transcript being comprised of constitutionally infirm testimony; and (3) he unknowingly waived his right to a sentencing jury owing to his attorney's incompetence, and hence, he was sentenced by a different trier of fact altogether.

This Court will also have an opportunity to consider the application of the factors it relied upon in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether prejudice should be presumed. This test is satisfied with respect to the denial of consular notification. The failure to accord a defendant his consular rights is "easy to identify": the foreign national was either notified or not. The government is "directly responsible" for failing to give consular notifications. Violations are "easy for the government to prevent": all the government need do is to provide the notice it is legally required to give. Measuring the "precise effects" of the violation may at times be "difficult," and trial courts are able to make "early inquiry" to determine whether a defendant has been duly notified of his consular rights. *Strickland*, 466 U.S. at 692-93.

B. The Violation of the Vienna Convention Was Not Harmless Beyond a Reasonable Doubt

Even if this Court decides that a violation of the Vienna Convention is characterized as an error of the trial type, it did not constitute harmless error in this case. In order for an error to be harmless beyond a reasonable doubt, the verdict rendered

must be "surely unattributable" to the error. *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). The guilty verdicts and sentences imposed in this case cannot be said to be "surely unattributable" to the failure to abide by the Vienna Convention, because, *inter alia*:

- *There was no mitigation defense at sentencing.* Gregory Madej was sentenced to death after defense counsel conducted no investigation and presented no mitigating evidence at sentencing. *People v. Madej*, 685 N.E.2d at 918 (defense mitigation "tantamount to the presentation of no evidence at all"). With the assistance of the Polish Consulate, Gregory Madej would have enjoyed representation by competent counsel at sentencing who would have investigated and presented evidence relating to Gregory Madej's: (1) character and family background (including his immigrant roots, his brutal beatings as a child, his attempts to defend his mother from physical abuse, the lack of attention he received from his father, his care for his mother after her serious leg injury, and his assistance to recent Polish immigrants) (C. 133-34, 136-38, 574-75, 577-79); (2) educational, military and work history (including his honorable discharge from the United States armed forces) (C. 166, 607); (3) alcohol and drug addiction (including his propensity to lose consciousness after using drugs and alcohol, and the noticeable violent effect drugs and alcohol had on his personality) (C. 177, 180, 618, 621); (4) extreme mental or emotional disturbance at the time of the offense (including expert testimony that his drug abuse resulted in substantially diminished capacity and extreme mental and emotional disturbance) (C. 68-71, 90-91, 509-12, 531-32); (5) relative youth at the time the offense was committed; (6) good behavior during incarceration and excellent rehabilitative potential (C. 141-42, 163, 170-72, 582-83, 604, 611-13); and (7) demonstrated remorse for his conduct. (C. 171, 612) In addition, competent counsel would have presented the testimony of (8) the decedent's

husband, David Doyle, who would have asked the sentencing body to spare Gregory Madej's life (C. 255-56, 695-96); and (9) Father Philipski, who would have testified as to Gregory Madej's good character in prison. (C. 170-72, 611-13)

• *The trial court expressly relied on Gregory Madej's constitutionally infirm testimony in sentencing him to death.* As the State admits (C. 275), Gregory Madej testified at trial without being informed that it was his decision whether he wanted to testify. His damaging testimony (which the State characterizes as a confession to murder) infected the entire proceedings. Had competent counsel been retained with the assistance of the Polish Consulate, this error would not have occurred. Given that the State admits the sentencing court relied on Gregory Madej's testimony (C. 275), it is impossible to say that the death sentence in this case is "surely unattributable" to his testimony.

• *Gregory Madej was unaware a sentencing jury must be unanimous to impose the death penalty.* Had Gregory Madej been informed of the one-juror rule, he would not have waived jury sentencing. (C. 63, 504) Accordingly, there would have been a different sentencer altogether.

Accordingly, this case presents a comprehensive record upon which to determine the appropriate prejudice standard under domestic law and to make a prejudice determination, if necessary.

III. THE WRIT SHOULD BE GRANTED BECAUSE, UNLIKE IN *BREARD* AND *FEDERAL REPUBLIC OF GERMANY*, THERE IS NO BAR TO CONSIDERATION OF THE MERITS

As discussed below, this case presents an opportunity to address the issues presented, free from many of the procedural problems that arose in *Breard* and *Federal Republic of Germany*.

A. The Procedural Issues That Confronted This Court in *Breard* and *Federal Republic of Germany* Are Not Present Here

In light of this Court's stated reasons for denying *certiorari* in *Breard* and *Federal Republic of Germany*, it is important to note what this case is *not* about. First, this Court's jurisdiction over this matter will not be in controversy. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. Accordingly, this Court need not decide whether it may exercise its original jurisdiction. *See, e.g., Federal Republic of Germany*, 526 U.S. at 112 (noting doubt over existence of original jurisdiction).

Second, this is not a "last-minute" request for review prior to a scheduled execution. *Id.* (declining to exercise jurisdiction based in part on "tardiness of the pleas" filed two hours before scheduled execution); *Breard*, 523 U.S. at 372 (denial of *certiorari* issued on evening of scheduled execution). No execution has been scheduled — indeed, the Illinois Supreme Court has issued an order staying its mandate until federal *habeas* proceedings are concluded. (App. 49a) Accordingly, this Court's consideration of this case will not serve to interfere with an imminent execution, as in *Breard* or *Federal Republic of Germany*.[13]

---

13. It is also of great significance that the Consul General has sought relief from this Court in an expeditious fashion upon discovering the violation of the Vienna Convention in 1998. Clearly the Consul General has not rested on his rights; on the contrary, the Consul General has been an active participant in these proceedings since the time they were before the Circuit Court of Cook County.

Third, because this matter is on direct review from the Illinois Supreme Court, instead of on *habeas* review, the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") and the so-called "last-in-time" doctrine, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), are not applicable to this proceeding. *Cf. Breard*, 523 U.S. at 376 (discussing last-in-time doctrine and AEDPA). Nor is the retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), applicable.[14]

Fourth, this case does not implicate Eleventh Amendment principles. The State courts have permitted the Consul General's participation in this case. Indeed, the Circuit Court specifically granted the Consul General's motion to intervene as a party in the proceedings relative to the *Mandamus* Petition, and subsequently, the Circuit Court declined to dismiss the *Mandamus* Petition in part to ensure that the Consul General could participate as a party. (R. 7 (Feb. 26, 1999)) Accordingly, the Eleventh Amendment has no application here. *See McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 30-31 (1990).

Fifth, there is no issue of standing. The Court has properly before it both the sovereign nation that is a party to the Vienna Convention, as well as the individual foreign national who was denied his right to consular notification and assistance under the Vienna Convention. In no real sense can this case turn on the issue of standing, unless the rule is that no one — neither a signatory, nor an aggrieved foreign national — may vindicate their treaty rights in the courts of the United States.

---

14. The State did not timely raise a *Teague* defense below. Moreover, *Teague* would not be applicable in any event, because this Court's interpretation of a federal treaty will not announce: (i) a "constitutional" rule; (ii) a rule of "criminal procedure," but instead shall constitute a substantive interpretation of a treaty; and (iii) a "new rule" to the extent it vindicates the authority of federal law over state law pursuant to the Supremacy Clause. *See Teague*, 489 U.S. at 310.

B. There Is No Adequate and Independent State Ground Barring Review

To be sure, although the procedural irregularities that faced this Court in *Breard* and *Federal Republic of Germany* are not present here, the State of Illinois may argue that review is barred by an adequate and independent state ground. Not so. As this Court has explained, in order for a non-federal ground to be sufficient to deny this Court jurisdiction, it must be both adequate and independent. *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). When a state ground of decision is "so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other," this Court has jurisdiction. *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). Such is the case here.

First, as noted above, the Petitioners argued that, under international law, the appropriate remedy for a violation of the Vienna Convention is to void a conviction or death sentence so obtained. In response, the Illinois Supreme Court noted that it appreciated the importance of the remedy of *restitutio in integrum* under international law, but for reasons that were not entirely clear, it did not believe that the remedy rendered the convictions and death sentence void. Thereafter, the majority opinion turned to state law to determine the federal question of whether a violation of international law rendered the orders entered in Gregory Madej's case void — clearly a violation of the Supremacy Clause. Accordingly, there is no independent state ground barring review of Petitioners' claims because the Illinois Supreme Court's decision to deny relief is based upon either: (i) its decision that the international law of remedies does not render the convictions and death sentence void or (ii) its refusal to apply international law in favor of state law. While state law establishes, as a procedural matter, that a void order may be attacked collaterally at any time, it does not, and cannot, establish whether an order is void as a substantive matter pursuant to the international law of remedies. Accordingly, the

Illinois Supreme Court's decision is dependent upon resolution of the federal issues presented. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

Second, the Illinois Supreme Court's decision is not independent because the Illinois Supreme Court denied *mandamus* relief based on the determination that the Petitioners had not "demonstrated . . . a clear, affirmative right to relief." (App. 11a) Accordingly, because this holding rests upon resolution of the federal issues presented herein, this Court may reach the merits. *See Hildwin v. Florida*, 490 U.S. 638, 639 n.* (1989) (*per curiam*) (where state court finds there is "no merit" to petitioner's claim, this Court has jurisdiction).[15]

C. Time-Barring the Petitioners' Claims Violates Due Process and International Law

In its opinion, the four-member majority of the Illinois Supreme Court announced that the Consul General was time-barred from asserting his rights with respect to the 2-1401 Petition, even though the State's failure to comply with the Vienna Convention had the insidious effect of preventing the Consul General from discovering the violation of the treaty until fourteen years after the limitation period passed. The majority did not address the argument that entry of judgment against the Consul General without notice was inconsistent with his due process rights. (Joint Brief at 60-61 (citing *Ligon v. Williams*, 637 N.E.2d 633, 640-41 (Ill. App. Ct. 1994); *Lerner v. Zipperman*, 387 N.E.2d 946, 950 (Ill. App. Ct. 1979))) In rejecting Petitioners' arguments relating to the application of Article 36(2) and international law,[16] the majority opinion

---

15. The Petitioners reserve the right to argue, if necessary, that there are compelling reasons that suggest there is no "adequate" state ground barring review either. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991).

16. Petitioners also argued that reliance on an internal procedural law to evade an international obligation violated international law and

(Cont'd)

relied upon this Court's analysis in *Breard*, which analysis Petitioners believe merits further review.

Accordingly, if necessary for this Court to reach the merits, Petitioners respectfully request that this Court grant the petition to consider whether time-barring the Petitioners under the circumstances of this case is consistent with the protections afforded them under the Due Process Clause, Article 36(2) of the Vienna Convention and international law.

CONCLUSION

For the foregoing reasons, this Court should grant the writ.

(Cont'd)
did not permit "full effect" to be given to the Vienna Convention as required by Article 36(2) thereof. (Joint Brief at 67-69; Reply Brief at 26-27)

WHEREFORE, for the foregoing reasons, Petitioners, the Consul General and Gregory Madej, respectfully ask this Court to grant a writ of certiorari in this cause and vacate the judgment of the Illinois Supreme Court.

Respectfully submitted,

CHARLES F. SMITH
Counsel of Record
CHRISTINA M. TCHEN
AMARJEET S. BHACHU
333 West Wacker Drive, Suite 2100
Chicago, Illinois 60606
(312) 407-0700

STEPHEN E. EBERHARDT
16860 South Oak Park Avenue
Suite 102
Tinley Park, Illinois 60477
(708) 444-2390

Attorneys for Petitioner
Gregory A. Madej

DOUGLASS W. CASSEL
CENTER FOR INTERNATIONAL
HUMAN RIGHTS
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, Illinois 60611
(312) 503-2224

Attorney for Petitioner Consul General
for the Republic of Poland in Chicago